

Members Quarterly

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Feature

New Leaves of Absence for Employees Coming Soon

Employment Standards Act (ESA) Update

On October 29, 2014, the statutory leaves of absence guaranteed to employees under the Employment Standards Act, 2000 (the "ESA") will be expanded to include three (3) new categories of leave: Family Caregiver Leave; Critically Ill Child Care Leave; and Crime-Related Death and Child Disappearance Leave.

The intended purpose of these new leave provisions is to help families care for sick loved ones or deal with a crime--related loss or disappearance of a child. The new leaves are in addition to the existing leaves available under the ESA and can be used in combination with traditional leaves under the ESA, such as the Family Medical Leave, if the employee qualifies for both. As is the case with the other leaves under the ESA, the new leaves will be unpaid. However, certain employment insurance benefits may be available in the right circumstances.

Here is a brief overview of the new leaves of absence and the key points of interest for employers.

Family Caregiver Leave

Family Caregiver Leave allows employees to take up to eight (8) weeks of unpaid, job protected leave per calendar year in order to provide care or support to specified family members. The eight (8) weeks of leave apply to each family member described in the section and the leave can be taken in less than full week periods.

The leave is conditional on a qualified health practitioner issuing a certificate stating that the family member has a "serious medical condition". The definition of "qualified health practitioner" includes not only physicians but registered nurses and psychologists. The definition of "serious medical condition" has not been provided but the legislation has stated that it will include "a condition that is chronic or episodic", leaving considerable room for interpretation.

A family member under this section includes:

- the employee's spouse, parent, step-parent or foster parent of the employee or the employee's spouse;
- a child, stepchild or foster child of the employee or the employee's spouse;
- a grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse;
- the spouse of a child of the employee; or
- the employee's brother or sister; or a relative of the employee who is dependent on the employee for care or assistance.



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Excluded under the definition of family member are aunts, uncles, nieces, nephews and cousins. However, such individuals could potentially fall under the broad category of “a relative of the employee who is dependent on the employee for care or assistance”.

The employee is required to advise the employer in writing that they will be taking such a leave, or as soon as reasonably possible if the employee must begin the leave before advising the employer. Employers are entitled to request the medical certificate and the employee must provide said certificate “as soon as possible”.

Critically Ill Child Care Leave

Critically Ill Child Care Leave allows an employee, who has been working for at least six (6) consecutive months, up to thirty-seven (37) weeks of unpaid leave to care for their critically ill child. This leave can be taken in less than full week periods. The definition of child includes step-child, foster child or child who is under legal guardianship and who is under eighteen (18) years of age.

In order for an employee to be eligible for this leave, the child must meet the definition of “critically ill” which is defined as “a child whose baseline state of health has significantly changed and his life is at risk as a result of an illness or injury”. The determination of whether a child meets this definition is to be made by a qualified health practitioner. The qualified health practitioner must issue a certificate which states that the child is critically ill and requires the care and support of one (1) or more parents; and sets out the period during which the child requires the care or support. The employee will only be entitled to take a leave for the number of weeks in the period specified in the certificate.

An employee who wishes to take this leave must advise the employer in writing and provide the employer with a written plan indicating the weeks in which the employee will be taking the leave. Similar to Family Caregiver Leave, employers are entitled to request the medical certificate.

Employees may be eligible to receive employment insurance known as special benefits for Parents of Critically Ill Children.

Crime-Related Child Death and Disappearance Leave

Crime-Related Child Death and Disappearance Leave allows employees, who have been working for at least six (6) consecutive months, up to fifty-two (52) weeks of unpaid leave where the child has disappeared as a result of a crime, or up to one hundred and four (104) weeks where the child dies as a result of a crime. Under this section, the definition of child includes “a child, step-child or foster child who is under the age of eighteen (18) years of age”.

The employee is only entitled to this leave if it is probable that the disappearance or death is the result of a crime. If an employee on a leave under this section discovers that it is no longer probable that the child died or disappeared as a result of a crime, the employee’s entitlement to leave ends on the day on which it no longer seems probable. If the child who has gone missing is found within the fifty-two (52) week period, the employee is entitled to remain on leave for fourteen (14) days after the child is found or take one hundred and four (104) weeks of leave from the day the child disappeared, if the child is found dead. If the child is found dead more than fifty-two (52) weeks after the week in which the child disappeared, the employee is entitled to take another leave under this section of up to one hundred and four (104) weeks.

Unlike the other sections, the employee may only take this leave in a single period. As with the other leaves, the employee must advise the employer in writing of the intention to take the leave

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and provide a written plan that indicates the weeks in which the employee will take the leave. An employer may require an employee who takes a leave under this section to provide evidence supporting the leave that is “reasonable in the circumstances”.

Employees entitled to leave under this section may be eligible to receive income support from the federal government in the form of Support for Parents of Murdered or Missing Children Grant.

Conclusion

These three leaves considerably expand family-related leave entitlements under the ESA. Accordingly, employers should be prepared to manage potentially lengthy absences as a result of these new leaves. Employers should also review their existing policies, procedures and contracts to consider how best to incorporate these new leaves and ensure that any policies are compliant with same. Finally, employers should ensure that any employees who take leaves under these provisions are aware of their potential entitlement to employment insurance benefits under either general employment insurance, special benefits or income support as discussed above.

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